IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 75-1753

SANTA FE INDUSTRIES, INC., SANTA FE NATURAL RESOURCES, INC. and KIRBY LUMBER CORPORATION,

Petitioners,

against

S. WILLIAM GREEN, ET AL.,

Respondents.

BRIEF ON BEHALF OF PETITIONERS

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Opinions Below

The opinion of the United States District Court for the Southern District of New York, reported at 391 F.Supp. 849, is printed at pages 105a-116a of the Appendix hereto. The opinions in the United States Court of Appeals for the Second Circuit, reported at 533 F.2d 1283, are printed at pages 119a-175a in the Appendix. The memorandum of the Court of Appeals denying rehearing *en banc*, reported at 533 F.2d 1309, is printed at pages 176a-178a in the Appendix.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1). The judgment of the Court of Appeals for the Second Circuit was entered on February 18, 1976. Petitioners' timely petition for rehearing was denied on March 10, 1976. The petition for certiorari was filed on June 2, 1976. This Court granted certiorari on October 4, 1976.

Constitutional Provisions, Statutes and Regulations

Involved herein are the Tenth Amendment to the Constitution of the United States, Section 10(b) of the Securities Exchange Act of 1934, 15 USC § 78j(b), Securities and Exchange Commission Rule 10b-5, 17 CFR 240.10b-5 and Sections 253 and 262 of the Delaware Corporation Law, the texts of which are printed in the Appendix hereto.

Questions Presented for Review

1. May an action be maintained under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 thereunder, where there is no allegation of any misrepresentation or nondisclosure, and solely on the basis of allegations that the stock of minority stockholders of a company involved in a short form merger was undervalued, and that there was no "corporate purpose" for the merger?

2. Do Section 10(b) and Rule 10b-5 authorize a federal court, in the absence of any allegation of misrepresentation or nondisclosure, to condemn, as a breach of corporate "fiduciary duty," conduct which is expressly sanctioned by the state which created the corporation, and to impose requirements of "corporate purpose" and advance notice

on the use of a state short form merger statute, when it is conceded that the law of the state imposes no such requirements?

Statement of the Case

This is an action in which plaintiffs, who were minority stockholders of the Kirby Lumber Corporation ("Kirby"), originally complained of the alleged undervaluation of their stock, at $150 per share, in connection with a corporate merger. The controlling interest in Kirby, a Delaware corporation, was owned by petitioner Santa Fe Natural Resources, Inc. ("Resources"), which in turn is wholly owned by petitioner Santa Fe Industries, Inc. ("Santa Fe"), the parent company of The Atchison Topeka and Santa Fe Railway Company. A subsidiary of Santa Fe acquired approximately 60 percent of the stock of Kirby in 1936, as a result of the reorganization of Kirby's predecessor. Over the succeeding years, Santa Fe and its subsidiaries, including Resources, made additional purchases of Kirby stock. In 1967, pursuant to a tender offer at $65 per share, a predecessor of Resources increased its ownership to approximately 95 percent of the stock of Kirby. Between 1968 and 1973, Resources and its predecessor purchased small additional amounts of Kirby stock, at prices ranging from $65 to $92.50 per share (A 33a).*

Section 253 of the Delaware Corporation Law ("DCL") permits a parent corporation, which owns at least 90 percent of the stock of a subsidiary, to merge with that subsidiary, upon approval by the parent's board of directors, and to make payment in cash for the shares of the minority stockholders. Section 253, known as the "short form merger" statute, does not require consent of, or advance notice to the minority stockholders. However, notice of the merger must be given within 10 days after its effective

* Citations to "(A)" are to the Appendix herein.

date, and any stockholder who is dissatisfied with the amount offered for his shares is entitled to obtain an appraisal in the Delaware Court of Chancery. DCL §§ 253(d), 262.

Resources decided to invoke Section 253, and complied fully with the provisions of the statute. Resources obtained, from independent appraisers, written appraisals of the physical assets of Kirby (A 82a-84a). These appraisals, in turn, were submitted to the investment banking firm of Morgan Stanley & Co. ("Morgan Stanley"), which had been retained to make an independent valuation of the stock. Morgan Stanley submitted a report valuing the stock at $125 per share (A 80a-81a). Resources thereafter decided to pay the minority stockholders $150 per share (A 12a) —a figure more than 50 percent above the highest price at which Kirby had traded for many years (A 33a).

To implement the short form merger, Resources caused to be organized another Delaware corporation, Forest Products, Inc. ("FPI"). Resources transferred to FPI its approximately 95 percent holding of Kirby stock, and gave to FPI the sum of $3,798,675, which was the amount necessary to pay $150 per share to the holders of the 25,324½ minority shares.* Resources also assumed certain liabilities, and assumed all costs and expenses of FPI and Kirby in connection with the merger (A 20a).

On July 31, 1974, FPI was merged with Kirby, with Kirby as the surviving corporation. In compliance with the Delaware statute (DCL § 253 (b)), the minority stockholders of Kirby were notified of the merger on August 1, 1974, and were advised of their right to receive $150 per

* The court below erroneously assumed (see 533 F.2d at pages 1285, 1289, 1290) that corporate funds of Kirby were used to make the cash payments to minority stockholders. In fact, the record is clear that the funds of Kirby were not used for this purpose (A 19a-20a).

share, or to obtain appraisal if they were dissatisfied with that amount (A 12a-14a).

With the notice, the minority stockholders received an extensive and detailed information statement (A 15a-98a). Plaintiffs herein do not challenge the accuracy or completeness of the information statement; on the contrary, all of plaintiffs' assertions of undervaluation were derived from the information furnished by the defendants to the minority stockholders (see 533 F.2d at pages 1288-9). Plaintiffs thus do not dispute that all of the material facts were made available to the minority stockholders, prior to the time when stockholders had to decide whether to accept the $150 per share, or press their claim for an appraisal pursuant to Delaware law. The statement sent to minority stockholders contained, in addition to substantial financial data about Kirby:

1. an opinion by Morgan Stanley that the fair market value of the Kirby stock was $125 per share (A 80a-81a) (although the highest actual sale price had been $92.50 (A 33a));

2. an appraisal of Kirby's land, timber, buildings and machinery conducted by Appraisal Associates (A 82a-84a); and

3. an appraisal of Kirby's oil and gas royalty interests and Kirby's ownership in mineral properties by Riggs and Associates, a firm of petroleum reservoir consultants (A 85a-97a).

On August 21, 1974, plaintiffs invoked their right of appraisal under Delaware law. On September 9, 1974, however, plaintiffs purported to withdraw their demand for appraisal,* and filed the present action on the following day.

* However, a number of other stockholders pressed their requests for appraisal, and discovery proceedings are now in progress in the Delaware Court of Chancery. *Bell, et al.* v. *Kirby Lumber Corporation*, C.A. No. 4076.

Plaintiffs' original complaint against Santa Fe and Morgan Stanley alleged that the fair market value of Kirby's land and timber exceeded its book value by an amount equivalent to $622 per share, and that this amount "added to the $150 per share, yields a value of at least $772 per share." It was alleged that "freezing out the minority stockholders of Kirby at the grossly undervalued price of $150 per share" constituted "a manipulative and deceptive device in breach of SEC Rule 10b-5 and a breach of fiduciary obligation owed to Kirby and its minority stockholders" (A 6a).

Defendants moved to dismiss the complaint for failure to state a claim, on the ground that, assuming *arguendo* that the stock was undervalued as alleged,* no claim of deception or nondisclosure was made, and the complaint merely asserted an appraisal claim, which should properly be brought in the Delaware state courts.

Thereafter, plaintiffs amended their complaint (A 99a-104a) to add the allegation that the merger had been conducted "without prior notice" to the minority stockholders. It is undisputed that the Delaware statute does not require notice prior to the merger, and that the minority stockholders received the information statement in ample time to make a demand for appraisal. By stipulation, the motion to dismiss was deemed addressed to the amended complaint.

* In fact, in the Delaware appraisal action, these figures are sharply disputed. As noted, the price paid to minority stockholders was far above any price at which the shares had traded for many years. Also, the law of Delaware is clear that the value of the stock is not determined solely by liquidation or asset value, but includes all other relevant factors, such as market value, dividend value, and earnings value. *See, e.g., Application of Delaware Racing Ass'n*, 213 A.2d 203 (Del. Sup.Ct. 1965). Further, there is no valid basis even on plaintiffs' theory for *adding* the $150 per share tendered by defendants to the asset value figure computed by plaintiffs. None of these issues, however, were presented by the motion addressed to plaintiffs' purported claim under the federal securities laws.

The District Court granted defendants' motion to dismiss for failure to state a claim, noting the complete absence of any allegation of misrepresentation or nondisclosure, and holding (391 F.Supp. at page 853):

> "The primary objective of Rule 10b-5 is to impose a duty of disclosure upon a corporation and its controlling persons. Popkin v. Bishop, 464 F.2d 714 (2d Cir. 1972). That objective is to be achieved in conjunction with the state corporate law. This Court does not regard Rule 10b-5 as an omnibus federal corporation law having such broad reach as to modify the notice requirements of the Delaware merger statute, or prevent Delaware, in its legislative wisdom, from providing a means by which a majority can exclude a minority from the corporation's future affairs, so long as due process is satisfied, as it is here, by the appraisal procedures."

A divided panel of the Court of Appeals reversed the dismissal of the complaint. The majority held that the requirements of Rule 10b-5 were satisfied by the allegation of "a breach of fiduciary duty," even in the absence of misrepresentation or nondisclosure (533 F.2d at page 1287), and stated (*ibid.*):

> "Our later review of the decisions of this Court on the subject of allegations under Rule 10b-5 of breaches of fiduciary duty by a majority against minority shareholders without any charge of misrepresentation or lack of disclosure will, we think, demonstrate that in such cases misrepresentation or lack of disclosure are not essential ingredients of the claim for relief by the minority. But, lest there be any lingering doubt on

this point, we now hold that in such cases, including the one now before us, no allegation or proof of misrepresentation or nondisclosure is necessary."

Thereafter the full bench of the Court of Appeals, noting that review by this Court was anticipated because of the "extraordinary importance" of the issues presented (533 F.2d at page 1310), denied rehearing *en banc.*

Summary of Argument

The court below erred in eliminating misrepresentation and nondisclosure as necessary elements of a claim under Section 10(b) and Rule 10b-5. The purpose of these provisions is to substitute full disclosure for the philosophy of *caveat emptor. Affiliated Ute Citizens* v. *United States,* 406 U.S. 128, 151; *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 744. Where all the material facts have been fully and accurately disclosed, as in the present action, Rule 10b-5 cannot validly be invoked in order to pass judgment on the merits of the underlying transaction.

Any construction of Rule 10b-5 must turn first to the language of the statute itself, since the scope of the rule promulgated by the Securities and Exchange Commission cannot exceed the power granted to the Commission by Congress. *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 213-4. Section 10(b), by its terms, is expressly concerned with deception. The numerous decisions prior to the present action, holding that deception is an essential element of a Rule 10b-5 claim, are clearly mandated by the language and purpose of the statute.

Contrary to the statute, the decision below would extend Rule 10b-5 to cover virtually all appraisal and valuation cases which have previously been heard in the state courts. Although plaintiffs have sought other labels for their claim in an effort to maintain it in the federal courts, the gravamen of their complaint is still the alleged undervaluation of their stock. Further, the opinion of the majority would extend Rule 10b-5 beyond short form mergers, to cover any alleged "breach of fiduciary duty" by a majority shareholder. Under this standard, virtually all corporate and shareholder litigation would henceforth fall within the scope of the federal securities laws, by the mere addition of a claim of fiduciary misconduct.

In reaching this result, the court below condemned, as "a breach of fiduciary duty," a transaction expressly authorized by the legislature and sanctioned by the courts of Delaware, and has treated as a "fraudulent device" the statute of a sovereign state. The establishment of a new rule of federal common law, nullifying the state short form merger statute, disregards principles established by applicable decisions of this Court, from *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 to *Cort* v. *Ash,* 422 U.S. 66.

Such drastic federal preemption, in an area traditionally committed to state regulation, would raise serious constitutional questions under the Tenth Amendment, even if it were supported by the statute. Certainly, such a preemption should not be permitted in the absence of a clear Congressional intent. *See, e.g., United States* v. *Bass,* 404 U.S. 336, 349; *Apex Hosiery* v. *Leader,* 310 U.S. 469, 513. No such intent can properly be inferred from the language of Section 10(b). Further, the decision below does not even substitute any clear or coherent standard for the state law which it has overriden. If state corporate law is indeed to be preempted in this area, it should be done by Congressional action, and not by judicial legislation.

ARGUMENT

The Court of Appeals Erred in Eliminating Misrepresenation and Nondisclosure as Necessary Elements of a Claim Under Section 10(b) and Rule 10b-5

Less than a year after this Court reaffirmed the historic relationship of Rule 10b-5 to the "tort of misrepresentation and deceit," *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 744, the decision below has excised misrepresentation and nondisclosure as elements of Section 10(b) and Rule 10b-5. In effect, the Court of Appeals has transformed Section 10(b) from a disclosure provision into a mandate for the substantive regulation of corporate affairs, thereby supplanting state corporation law. In so doing, the Second Circuit disregarded the prior holdings of this Court that the fundamental purpose of the 1934 Act is "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor. . . .*" *Affiliated Ute Citizens* v. *United States,* 406 U.S. 128, 151; *S.E.C.* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 186. In order to reach its result, the lower court was also obliged to disregard the language of the statute itself, which makes deception or nondisclosure an indispensable part of any claim under Section 10(b).

The majority of the panel below sought to minimize the extent of its abrupt departure from existing law by citing (533 F.2d at page 1290) this Court's often quoted statement that "Section 10(b) must be read flexibly, not technically and restrictively." *Superintendent of Ins.* v. *Bankers Life and Cas. Co.,* 404 U.S. 6, 12. That principle, however, does not support the result reached by the lower court. Section 10(b) has indeed been read "flexibly" to reach many ingenious forms of deceit in many different forms of transaction. However, to eliminate deceit from the statute entirely, as the Court of Appeals has done here, is not

flexible interpretation, but judicial amendment. The process of interpretation cannot validly be stretched to "add a gloss to the operative language of the statute quite different from its commonly accepted meaning." *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 199.

As this Court noted in *Hochfelder,* any construction of Rule 10b-5 must "turn first to the language of § 10(b), for '[t]he starting point in every case involving construction of a statute is the language itself.'" 425 U.S. at page 197, quoting *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 756. The terms of the statute, as the Court further noted in *Hochfelder,* make unlawful the use of "any *manipulative or deceptive* device or contrivance" [emphasis added] in contravention of rules established by the Commission. No allegation of manipulation, as the term is used in the statute, is here involved.* The issue, therefore, is whether the court below erred in extending the statute, which prohibits "deceptive" devices, to cover cases where there is a complete absence of any deception whatsoever.

A large body of authority over the years, including several decisions in the Second Circuit itself, has squarely held that Section 10(b) is inapplicable to situations where deception and nondisclosure are absent. Thus, in *Popkin* v. *Bishop,* 464 F.2d 714 (2d Cir. 1972), the court noted, after reviewing a number of Rule 10b-5 decisions (464 F.2d at pages 719-20):

> "Thus, it seems clear that our emphasis on improper self-dealing did not eliminate non-disclosure as a key issue in Rule 10b-5 cases. Section 10(b) of the Exchange Act and Rule 10b-5 are designed principally to impose a duty to disclose and inform rather than to

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* As this Court noted in the *Hochfelder* case, 425 U.S. at page 199, the term "manipulative" was "virtually a term of art," relating to "conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities."

become enmeshed in passing judgments on information elicited."

The decision in *Popkin,* a long form merger case, which the Second Circuit has now impliedly overruled, was in accord with holdings in the Fifth and Seventh Circuits that "the gravamen of a 10b-5 cause of action is deception," and that no action under the Rule may be maintained in the absence thereof. *Bailes* v. *Colonial Press, Inc.,* 444 F.2d 1241, 1246 (5th Cir. 1971). *Accord, Rosin* v. *New York Stock Exchange, Inc.,* 484 F.2d 179, 183 (7th Cir. 1973), *cert. denied,* 415 U.S. 977. *See, also, Aboussie* v. *Aboussie,* 441 F.2d 150 (5th Cir. 1971); *Azalea Meats, Inc.* v. *Muscat,* 386 F.2d 5, 8 (5th Cir. 1967).

The majority of the court below sought to distinguish *Popkin* by asserting that, since a short form merger transaction does not require the approval of minority stockholders, disclosure to the stockholders is therefore irrelevant (533 F.2d at page 1291). Any such argument, however, was succinctly refuted by the court in *Popkin* (464 F.2d at page 720, note 16):

> "Where the right to appraisal and payment for shares is the exclusive shareholder remedy under state law, the federal disclosure provisions are still not 'nugatory.' They will help ensure that shareholders have the information necessary for an intelligent exercise of their appraisal rights."

The majority opinion below also sought to support its expansion of Rule 10b-5 by the argument (533 F.2d at pages 1286-7) that only subdivision (b) of the Rule specifically mentions misrepresentation and nondisclosure, while subdivisions (a) and (c) speak simply of "any device, scheme, or artifice to defraud," and "any act, practice, or course of business which operates or would operate as a fraud or deceit. . . ." From this, the majority of the panel proceeded to argue that "fraud" should be defined broadly enough to include conduct where no element of deceit was present, such as plaintiffs' allegation "that the stock was grossly undervalued and that there was no justifiable corporate reason for the merger" (533 F.2d at page 1287). As noted above, however, the statute which furnishes the authority for Rule 10b-5 speaks specifically in terms of deception. If subdivisions (a) and (c) had indeed been intended to dispense with any element of deceit or nondisclosure, they would have exceeded the Commission's rule making authority under the statute. As this Court held in *Ernst & Ernst* v. *Hochfelder, supra,* 425 U.S. at pages 212-14:

> "More importantly, Rule 10b-5 was adopted pursuant to authority granted the Commission under § 10(b). The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is ' "the power to adopt regulations to carry into effect the will of Congress as expressed by the statute," ' *Dixon* v. *United States,* 381 U.S. 68, 74 (1965), quoting *Manhattan General Equipment Co.* v. *Commissioner,* 297 U.S. 129, 134 (1936). Thus, despite the broad view of the Rule advanced by the Commission in this case, its scope cannot exceed the power granted the Commission by Congress under § 10(b)."

So here, petitioners submit that the Commission could not have eliminated deception from the statute by issuing a rule, and that the court below erred in doing so under the guise of interpretation.

In support of its expanded reading of subdivisions (a) and (c), the Court of Appeals also cited (533 F.2d at page 1290) language from a decision under the Investment Advisers Act of 1940, stating that " 'fraud' " as defined by " 'a court of equity' " covers numerous types of " 'breach of legal or equitable duty, trust and confidence.' " *S.E.C.* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 194, quoting from *Moore* v. *Crawford,* 130 U.S. 122, 128. Unlike

Section 10(b), however, the Investment Advisers Act is a comprehensive regulatory statute, laying down substantive federal standards of fiduciary responsibility for investment advisers. As the Court noted in the *Capital Gains* case (375 U.S. at pages 191-2):

> "The Investment Advisers Act of 1940 thus reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship,' as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested."

Moreover, the "fraud" involved in *Capital Gains* was, in fact, a nondisclosure. The issue therein, as stated by the Court (375 U.S. at page 181), was "whether under the Investment Advisers Act of 1940 the Securities and Exchange Commission may obtain an injunction compelling a registered investment adviser to disclose to his clients a practice of purchasing shares of a security for his own account shortly before recommending that security for long-term investment and then immediately selling the shares at a profit upon the rise in the market price following the recommendation." The Court in *Capital Gains* emphasized that the only relief sought was the " 'mild prophylatic' " of full disclosure (375 U.S. at page 193), and held (375 U.S. at page 201):

> "The statute, in recognition of the adviser's fiduciary relationship to his clients, requires that his advice be disinterested. To insure this it empowers the courts to require disclosure of material facts. It misconceives the purpose of the statute to confine its application to 'dishonest' as opposed to 'honest' motives. . . . The high standards of business morality exacted by our laws regulating the securities industry do not permit an investment adviser to trade on the market effect of his own recommendations without fully and fairly revealing his personal interests in these recommendations to his clients."

Thus, the decision in *Capital Gains* furnished no basis for eliminating nondisclosure from Rule 10b-5.*

In initiating this radical transformation of Section 10(b) and Rule 10b-5, the court below has also disregarded "the danger of vexatious litigation which could result from a widely expanded class of plaintiffs under Rule 10b-5" (see *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. at page 740). At a minimum, the decision by the Court of Appeals would extend federal jurisdiction to appraisal and valuation cases which heretofore have normally been litigated in the state courts. See Note, 89 Harv. L. Rev. 1917, 1928-9 (1976). To be sure, the majority opinion indicated that Rule 10b-5 would be extended to cover claims of undervaluation only in the absence of a "valid corporate purpose" (533 F.2d at page 1292). However, as discussed below, short form mergers serve a variety of corporate purposes by their very nature;** the majority opinion does not indicate what additional "corporate purpose," if any, could suffice to prevent a shareholder from transforming his state appraisal claim into a federal securities

* The Rule 10b-5 cases cited in the majority opinion also involved nondisclosure. Thus, *e.g.,* in *Schoenbaum* v. *Firstbrook,* 405 F.2d 215 (2d Cir. *en banc* 1968), *cert. denied sub nom., Manley* v. *Schoenbaum,* 395 U.S. 906, cited by the majority at 533 F.2d at page 1290, the defendants had caused the corporation to sell stock at an unreasonably low price, without disclosing that they had inside information of a major oil discovery which would greatly increase the value of the shares. In *Voege* v. *American Sumatra Tobacco Corp.,* 241 F.Supp. 369 (D. Del. 1965), cited at 533 F.2d at page 1290, the defendants had acquired their 90% position through a tender offer, in connection with which they concealed the fact that they planned a partial liquidation of assets which would result in a higher yield per share than the total price being offered (241 F.Supp. at page 373).

** See pages 21-3, *infra*.

action. In fact, plaintiffs have no real interest in the presence or absence of a "corporate purpose"; their sole objective is to obtain as much money as possible for their stock.* Conversely, no corporate purpose, however compelling, would eliminate plaintiffs' dissatisfaction with the alleged undervaluation. The decision below would, in fact, merely make the federal courts a duplicate forum for the appraisal procedure already available in the state courts of Delaware, merely by the addition of an amorphous charge of "no corporate purpose."

The reach of the decision below, moreover, extends far beyond merger and appraisal situations. Elsewhere in its opinion (533 F.2d at page 1289), the panel stated that its decision applies to any *"Breach of Fiduciary Duty by Majority Shareholders with Resulting Detriment to the Minority. . . ."* [emphasis in original] Indeed, under the lower court's new proposed reading of Section 10(b), it is difficult to see how any stockholder or derivative litigation, previously cognizable only in the state courts, could fail to state a claim under the federal securities laws.

The Second Circuit's proposed expansion of Rule 10b-5 is, moreover, both vague and apparently unlimited. The "fiduciary duty" said to have been violated was clearly not established by Delaware law, since the legislature and courts of Delaware have made it very clear that no such duty was violated by the action of defendants herein (see pages 19-21, *infra*). It is entirely unclear, however, what the source or extent of this "fiduciary duty" actually is, or what the "breach" consists of. Thus, both the majority and concurring opinions below stated that "fiduciary duty" is breached if "corporate funds" are used to purchase the minority stock interest (533 F.2d at pages 1285, 1289,

* "We need not argue that every short form merger without business purpose is in violation of Rule 10b-5; the gravamen of our complaint is that the price is unconscionable—a violation whether or not it has a business purpose." Plaintiffs' Brief in the Court of Appeals, page 33.

1290); in this case, however, the record is undisputed that Resources supplied the funds for the payments made to minority stockholders, and that no corporate funds of Kirby were used for this purpose (A 20a). Again, the concurring opinion dwells at length on the unfairness of cases where companies "go public" at inflated prices and then repurchase stock from the public at a fraction of the original price (533 F.2d at page 1295). Yet, the record was undisputed that Kirby was publicly held before Resources acquired its interest, and that the price paid by Resources was the highest price paid for Kirby stock in many years (A 33a).

In radically expanding Rule 10b-5, beyond the scope of the statutory language, the court below has created a virtually unlimited potential for confusion and uncertainty. The adverse effects of such uncertainty, and of the vast increase in litigation which would inevitably result, were forcefully stated in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 747-8:

> "While much of the development of the law of deceit has been the elimination of artificial barriers to recovery on just claims, we are not the first court to express concern that the inexorable broadening of the class of plaintiff who may sue in this area of the law will ultimately result in more harm than good. In *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 174 N.E. 441 (1931), Chief Judge Cardozo observed with respect to 'a liability in an indeterminate amount for an indeterminate time to an indeterminate class':
>
> > " ' "The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences." ' *Id.*, at 179-180, 174 N.E., at 444."

See, also, Ernst & Ernst v. *Hochfelder*, 425 U.S. 185, 214-5, n. 33.

Plaintiffs have argued in the alternative (Brief in Opposition to Petition, pages 12-4) that there was "non-disclosure" on the facts here, because there was no premerger notice. Such notice is irrelevant since under Delaware law there is no right to enjoin a short form merger, *Stauffer* v. *Standard Brands Inc.*, 187 A.2d 78 (Del. Sup. Ct. 1962).* The information statement was distributed well before minority stockholders were required to decide between tendering their shares and demanding appraisal, which is the relevant notice for a short form merger. *Popkin* v. *Bishop, supra,* 464 F.2d at page 720, note 16. *See, also, Ryan* v. *J. Walter Thompson Co.,* 453 F.2d 444 (2d Cir. 1971), *cert. denied,* 406 U.S. 907.

It is clear that the decision below must rest, as the majority of the panel frankly recognized, on a holding that "no allegation or proof of misrepresentation or nondisclosure is necessary" to support a claim under Rule 10b-5 (533 F.2d at page 1287). We submit that such a result is contrary to the language of the statute, to previously existing authority, and to sound considerations of policy, and that accordingly this decision should be reversed.

* As there stated:

"Indeed it is difficult to imagine a case under the short merger statute in which there could be such actual fraud as would entitle a minority to set aside the merger. This is so because the very purpose of the statute is to provide the parent corporation with a means of eliminating the minority shareholder's interest in the enterprise. Thereafter the former stockholder has only a monetary claim." 187 A.2d at 80.

The Decision of the Court Below Would Create a Federal Common Law of Corporations Contrary to Valid State Statutes

The majority of the court below held that the complaint sufficiently pleaded a breach of corporate "fiduciary duty," in alleging that the short form merger was implemented without a valid corporate purpose (533 F.2d at page 1291). The court below specifically recognized that the applicable Delaware statute provides for elimination of minority interests under ten percent "without prior notice to the minority shareholders, [and] without any statement of corporate purpose" (533 F.2d at page 1289), and it is not disputed that Resources and Kirby complied meticulously with the requirements of the statute.

The majority nevertheless proceeded to hold that the implementation of the short form merger procedure, expressly sanctioned by the legislature and courts of Delaware,* constituted in itself a "fraud" and breach of "fiduciary duty" as a matter of federal law. It did so in a situation where the Supreme Court of Delaware has clearly held that no such fiduciary duty exists, and that the holders of a less than ten percent minority interest have no vested right to remain stockholders. *See, e.g., Stauffer* v. *Standard Brands Inc.,* 187 A.2d 78, 80 (Del. Sup. Ct. 1962). ("This power of the parent corporation to eliminate the minority is a complete answer to plaintiff's charge of breach of trust. . . .")

In brushing aside the Delaware statute with the comment that state remedies are "not preemptive or exclusive," and that remedies under the Exchange Act "are

* *See, e.g., Stauffer* v. *Standard Brands Inc.,* 187 A.2d 78 (Del. Sup.Ct. 1962); *Coyne* v. *Park & Tilford Distillers Corp.,* 154 A.2d 893 (Del. Sup.Ct. 1959); *Braasch* v. *Goldschmidt,* 199 A.2d 760 (Del. Ch. 1964). *See, also, Carl Marks & Co.* v. *Universal City Studios, Inc.,* 233 A.2d 63 (Del. Sup.Ct. 1967).

supplementary to those provided by the states" (533 F.2d at page 1286), the majority of the court below simply begs the question. The Supreme Court of Delaware has squarely held that "the very purpose of the statute is to provide the parent corporation with a means of eliminating the minority shareholder's interest in the enterprise." *Stauffer* v. *Standard Brands Inc.*, 187 A.2d 78, 80 (1962). In holding that the invocation of the Delaware statute can constitute a "fraud" under Rule 10b-5, the court below has not "supplemented" state law, but rather has flatly contradicted it, and has deliberately overruled policy judgments made by the legislature and courts of the state.

The result reached by the Court of Appeals is in conflict with the spirit of applicable decisions of this Court, from *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, to *Cort* v. *Ash*, 422 U.S. 66. Indeed, even if this drastic preemption of state corporate law were mandated by the statute, it would raise serious questions under the Tenth Amendment. *Cf. National League of Cities* v. *Usery*, —— U.S. ——, 96 S. Ct. 2465. However, such far reaching preemption of state law finds no support in the statutory language.

This Court has repeatedly held that an intent to preempt areas of traditional state regulation, or to make extensive changes in the balance of federal and state jurisdiction, "is not lightly to be imputed to Congress." *Apex Hosiery* v. *Leader*, 310 U.S. 469, 513. As this Court held in *United States* v. *Bass*, 404 U.S. 336, 349:

> "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."

Accord, United States v. *Gambling Devices*, 346 U.S. 441, 450.

Further, this Court has made it clear that this essential principle of federalism applies specifically to the regulation of corporate affairs. As was held in *Cort* v. *Ash*, *supra*, in disallowing a federal civil damage remedy for illegal corporate political contributions (422 U.S. at pages 84-5):

> "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation. . . . We are necessarily reluctant to imply a federal right to recover funds used in violation of a federal statute where the laws governing the corporation may put a shareholder on notice that there may be no such recovery."

So here, stockholders of Kirby, like stockholders of every other Delaware corporation, were on notice that the short form merger procedure was a part of the state's corporation law, and a part of the contractual relations between majority and minority stockholders. *See, also, Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 550-1.

The broad sweep of the decision below does violence to principles of federalism and of sound statutory construction. In the absence of a clear intent to the contrary, federal legislation, which is normally of limited scope and purpose, should be construed to supplement state law and not to supplant it. As was stated in *Hart and Wechsler's The Federal Courts and the Federal System* (2d Ed., Bator *et al.*, 1973) at pages 470-1:

> "Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation."

In overriding the Delaware law, the majority of the court below clearly indicated its disapproval of Delaware statutes which it believed to be "favorable to corporate management and designed to attract corporations to the state for the purpose, among others, of raising revenue for the state and furnishing business for the members of the legal profession located in Delaware" (533 F.2d at page 1289).* In fact, however, short form merger statutes like that enacted in Delaware do serve a variety of corporate purposes. As Judge Moore noted in his dissenting opinion (533 F.2d at page 1308):

> "The benefits to a corporation are varied. Freedom from worry about the impact of corporate decisions on stock prices; ability to take greater business risks than those sanctioned by federal securities agencies; a switch to more conservative accounting, resulting in lower taxes; the savings which result from no longer having to prepare, print and issue the myriad of documents required under federal and state disclosure laws; the removal of a pressure to pay dividends at the expense of long-term capital development or speculative capital investment—these are some of the advantages which may enure to a corporation 'going private'. It is essential to underscore that *all* of the above-stated advantages accrue from the *very act of eliminating the 10% shareholders who confer public status on the corporation.*" [emphasis in original] [footnotes omitted]

As one law review commentator has noted, the short form merger statutes which a majority of the states have enacted

* In fact, as noted in Judge Moore's dissent (533 F.2d at page 1299), at least 38 of the 50 states have similar merger statutes. Moreover, this type of short form merger statute did not originate in Delaware, as the majority suggests (533 F.2d at page 1289); rather Section 253 is modeled upon an earlier statute in New York, *Stauffer* v. *Standard Brands Inc.*, 187 A.2d 78, 80 (Del. Sup.Ct. 1962); *Coyne* v. *Park & Tilford Distillers Corp.*, 154 A.2d 892, 898 (Del. Sup.Ct. 1959).

may be taken to represent "a substantive determination that take-outs are socially desirable transactions when within the percentage limitations of such statutes." Borden, *Going Private—Old Tort, New Tort or No Tort?*, 49 N.Y.U.L. Rev. 987, 1025 (1975). In a federal system, state law on such points should not be lightly disregarded or overruled.

One may take issue—as the majority of the court below obviously did—with the policy judgment of the Delaware legislature that such corporate objectives are a sufficient basis for the enactment of a short form merger statute. Conversely, one might conclude, with the dissent below, that the majority's view of a "justifiable corporate purpose" is "a completely irrational concept that bears no reasonable relationship to the realities of short-form mergers in the actual business world" (533 F.2d at pages 1308-9). However, the issue here presented is whether a federal court should substitute its conclusion on the issue for that of the state legislature. In choosing to do so, the majority below disregarded the teaching of this Court that the function of the federal judiciary "is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations." *Evans* v. *Abney*, 396 U.S. 435, 447.

In the absence of a clear Congressional intent to preempt state law in this area—and no such intent, as set forth above, can validly be inferred from the language of Section 10(b)—we submit that the court below erred in overriding the state policy judgments embodied in the Delaware statute. As was observed by one recent commentator (Note, 89 Harv.L.Rev. 1917, 1928-9 (1976)):

> "As the *Green* opinion concedes, rule 10b-5 was not intended to be a panacea for all corporate ills. Yet if the definition of fraud under section 10(b) can be expanded to include federal common law concepts of breach of fiduciary duty and waste, it is difficult to

see what significant corporate ills remain for treatment by the states. For not only do the federal courts have exclusive jurisdiction over enforcement of 10b-5 claims, but also the substantive and procedural advantages of a federal forum to plaintiffs make it likely that virtually every suit for common law violations would gravitate to the federal courts. Surely, the 1934 Act did not contemplate confining state regulation of corporate behavior to those few cases in which mismanagement is accomplished wholly apart from any securities transaction." [footnotes omitted]

Further, the amorphous federal rule of "fiduciary duty," created by the court below to supplant the contrary law of Delaware on this point, intrudes into an especially inappropriate area. "It is one thing for federal courts to enforce recognized, state-created fiduciary duties but quite another for them to create new fiduciary duties." Borden, *Going Private—Old Tort, New Tort or No Tort?,* 49 N.Y. U.L. Rev. 987, 1037 (1974). As was stated in a widely-cited opinion by the New York Court of Appeals, "[t]he primary source of the law in this area ever remains that of the State which created the corporation." *Diamond* v. *Oreamuno,* 24 N.Y.2d 494, 503-4 (1969).

This Court recently had occasion to consider the *Diamond* case, in connection with another venture by the Second Circuit into the creation of corporate common law. In *Lehman Brothers* v. *Schein,* 416 U.S. 386, a derivative claim was asserted on behalf of a Florida corporation, against persons who had allegedly traded in the corporation's securities on the basis of non-public information. The New York courts had held in the *Diamond* case that, under New York law, a fiduciary who profited from the use of non-public information could be liable directly to the corporation; plaintiffs in the *Lehman Brothers* action sought to extend such liability to outsiders who acted in concert with fiduciaries. The Second Circuit, while rec-

ognizing that the Florida courts had not passed upon the issue, held that the rule advocated by plaintiffs should be adopted, as a further deterrent to insider trading. This Court reversed, holding that the Court of Appeals should have certified the question to the Florida Supreme Court, under a procedure made available by a Florida statute. With respect to the Second Circuit's discussion on the merits of the proposed rule, this Court observed (416 U.S. at page 389):

> "Such a construction of *Diamond,* the Court of Appeals said, would have 'the prophylactic effect of providing a disincentive to insider trading.' *Id.,* at 823. And so it would. Yet under the regime of *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), a State can make just the opposite her law, providing there is no overriding federal rule which pre-empts state law by reason of federal curbs on trading in the stream of commerce."

By promulgating a new federal rule of "fiduciary duty," in disregard of the applicable state law, the court below has in effect revived the discredited doctrine of *Swift* v. *Tyson,* 41 U.S. (16 Pet.) 1, and has recreated a federal common law of corporations, which would apparently supplant, to a still undefined extent, the substantive corporate law of the states. The dangers of creating federal common law in this area were forcefully stated by Borden, *Going Private—Old Tort, New Tort or No Tort?,* 49 N.Y.U.L. Rev. 987 (1975). After recalling the unfortunate developments under the doctrine of *Swift* v. *Tyson,* Professor Borden noted (49 N.Y.U.L. Rev. at page 1039):

> "If the federal securities laws are to be pushed so far beyond their original purpose as not only to enforce recognized standards of fiduciary obligations but to create new ones in a hotly debated area without deference to state law or empirical study or any balancing of the numerous competing social interests involved, one may suppose that one day there will again be a

> recognition of the 'mischievous result' of judicial law-making based upon an alleged 'transcendental body of law outside of any particular State' which federal courts in their good judgment may discern and apply. We will then have in the securities field our own *Erie* v. *Tompkins*." [footnotes omitted]

One "mischievous result" of the majority's decision is already apparent, in addition to its disregard of the balance between federal and state regulatory authority. As noted above, the concepts of federal "fiduciary duty" and "corporate purpose" announced by the majority are as ill-defined as they are lacking in authority. State corporation statutes have uniformly recognized, by the explicitness of their terms, that the obligations imposed by law on the corporation should be known with certainty. Under the decision of the Court of Appeals, corporate management can no longer rely on meticulous compliance with state corporate statutes, as an assurance that their actions will be lawful: the court below has held such compliance, in the complete absence of deception or nondisclosure, may constitute a "fraud" under Rule 10b-5, if it is later found contrary to a federal court's still-undefined concept of "fiduciary duty."

Moreover, the decision below makes it clear that this result will not be limited to short form mergers. In passing, the majority opinion notes (533 F.2d at page 1292) that other actions by majority shareholders may also be subject to *ad hoc* federal review, again in the absence of misrepresentation and nondisclosure: the majority concludes, almost casually, that this further expansion is "for another day." The uncertainty implied in this formulation is clearly in conflict with one major policy behind all state corporation statutes. To override a specific policy judgment of the state legislature, without a clear Congressional mandate, was a serious error on the part of the court below. To create widespread uncertainty and confusion in state

corporate regulation, similarly without any authority from Congress, is a still more serious error. Petitioners submit that this Court should not permit the resurrection of *Swift* v. *Tyson* in this area, and that the "mischievous results" of the lower court's action should be checked in their incipiency.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals with respect to petitioners should be reversed, and remanded with instructions to dismiss the amended complaint.

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Appendix—Constitutional Provisions, Statutes and Regulations

UNITED STATES CONSTITUTION AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

SECTION 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

RULE 10b-5

§ 240.10b—5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security. (Sec. 10; 48 Stat. 891; 15 U.S.C. 78j) [13 F.R. 8183, Dec. 22, 1948, as amended at 16 F.R. 7928, Aug. 11, 1961]

DELAWARE CORPORATION LAW

§ 253. Merger of parent corporation and subsidiary or subsidiaries

(a) In any case in which at least 90 percent of the outstanding shares of each class of the stock of a corporation or corporations is owned by another corporation and one of such corporations is a corporation of this State and the other or others are corporations of this State or of any other state or states or of the District of Columbia and the laws of such other state or states or of the District permit a corporation of such jurisdiction, to merge with a corporation of another jurisdiction, the corporation having such stock ownership may either merge such other corporation or corporations into itself and assume all of its or their obligations, or merge itself, or itself and one or more of such other corporations, into one of such other corporations by executing, acknowledging and filing, in accordance with section 103 of this title, a certificate of such ownership and merger setting forth a copy of the resolution of its board of directors to so merge and the date of the adoption thereof; provided, however, that in case the parent corporation shall not own all the outstanding stock of all the subsidiary corporations, parties to a merger as aforesaid,

the resolution of the board of directors of the parent corporation shall state the terms and conditions of the merger, including the securities, cash, property, or rights to be issued, paid, delivered or granted by the surviving corporation upon surrender of each share of the subsidiary corporation or corporations not owned by the parent corporation. If the parent corporation be not the surviving corporation, the resolution shall include provision for the pro rata issuance of stock of the surviving corporation to the holders of the stock of the parent corporation on surrender of the certificates therefor, and the certificate of ownership and merger shall state that the proposed merger has been approved by a majority of the outstanding stock of the parent corporation entitled to vote thereon at a meeting thereof duly called and held after 20 days' notice of the purpose of the meeting mailed to each such stockholder at his address as it appears on the records of the corporation. A certified copy of the certificate shall be recorded in the office of the Recorder of the County in this State in which the registered office of each constituent corporation which is a corporation of this State is located. If the surviving corporation exists under the laws of the District of Columbia or any state other than this State, the provisions of section 252(d) of this title shall also apply to a merger under this section.

(b) If the surviving corporation is a Delaware corporation, it may change its corporate name by the inclusion of a provision to that effect in the resolution of merger adopted by the directors of the parent corporation and set forth in the certificate of ownership and merger, and upon the effective date of the merger, the name of the corporation shall be so changed.

(c) The provisions of Section 251(d) of this title shall apply to a merger under this section, and the provisions of Section 251(e) shall apply to a merger under this section in which the surviving corporation is the subsidiary corpo-

ration and is a corporation of this State. Any merger which effects any changes other than those authorized by this section or made applicable by this subsection shall be accomplished under the provisions of Section 251 or Section 252 of this title. The provisions of Section 262 of this title shall not apply to any merger effected under this section, except as provided in subsection (d) of this section.

(d) In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under this section is not owned by the parent corporation immediately prior to the merger, the surviving corporation shall, within 10 days after the effective date of the merger, notify each stockholder of such Delaware corporation that the merger has become effective. The notice shall be sent by certified or registered mail, return receipt requested, addressed to the stockholder at his address as it appears on the records of the corporation. Any such stockholder may, within 20 days after the date of mailing of the notice, demand in writing from the surviving corporation payment of the value of his stock exclusive of any element of value arising from the expectation or accomplishment of the merger. If during a period of 30 days after such period of 20 days the surviving corporation and any such objecting stockholder fail to agree as to the value of such stock, any such stockholder or the corporation may file a petition in the Court of Chancery as provided in subsection (c) of section 262 of this title and thereupon the parties shall have the rights and duties and follow the procedure set forth in subsections (d) to (j) inclusive of section 262.

(e) A merger may be effected under this section although one or more of the corporations parties to the merger is a corporation organized under the laws of a jurisdiction other than one of the United States; provided that the laws of such jurisdiction permit a corporation of such jurisdiction to merge with a corporation of another jurisdiction; and provided further that the surviving or resulting corporation shall be a corporation of this State.

(As amended by Ch. 186, Laws of 1967, Ch. 148, Laws of 1969 and Ch. 106, Laws of 1973.)

§ 262. Payment for stock or membership of person objecting to merger or consolidation

(a) When used in this section, the word "stockholder" means a holder of record of stock in a stock corporation and also a member of record of a non-stock corporation; the words "stock" and "share" mean and include what is ordinarily meant by those words and also membership or membership interest of a member of a non-stock corporation.

(b) The corporation surviving or resulting from any merger or consolidation shall within 10 days after the effective date of the merger or consolidation, notify each stockholder of any corporation of this State so merging or consolidating who objected thereto in writing and whose shares either were not entitled to vote or were not voted in favor of the merger or consolidation, and who filed such written objection with the corporation before the taking of the vote on the merger or consolidation, that the merger or consolidation has become effective. Such notice shall likewise be given to each stockholder whose corporation approved the merger or consolidation pursuant to section 228 of this title without a meeting of its stockholders and who either did not, or had no right to, consent in writing to such merger or consolidation. If any such stockholder shall within 20 days after the date of mailing of the notice demand in writing, from the corporation surviving or resulting from the merger or consolidation, payment of the value of his stock, the surviving or resulting corporation shall, within 30 days after the expiration of the period of 20 days, pay to him the value of his stock on the effective date of the merger or consolidation, exclusive of any element of value arising from the expectation or accomplishment of the merger or consolidation.

(c) If during a period of 30 days following the period of 20 days provided for in subsection (b) of this section, the corporation and any such stockholder fail to agree upon the value of such stock, any such stockholder, or the corporation surviving or resulting from the merger or consolidation, may, by petition filed in the Court of Chancery within four months after the expiration of the period of 30 days, demand a determination of the value of the stock of all such stockholders by an appraiser to be appointed by the Court.

(d) Upon the filing of any such petition by a stockholder, service of a copy thereof shall be made upon the corporation, which shall within ten days after such service file in the office of the Register in Chancery in which the petition was filed a duly verified list containing the names and addresses of all stockholders who have demanded payment for their shares and with whom agreements as to the value of their shares have not been reached by the corporation. If the petition shall be filed by the corporation, the petition shall be accompanied by such a duly verified list. The Register in Chancery shall give notice of the time and place fixed for the hearing of such petition by registered or certified mail to the corporation and to the stockholder shown upon the list at the addresses therein stated, and notice shall also be given by publishing a notice at least once at least one week before the day of the hearing, in a newspaper of general circulation published in the City of Wilmington, Delaware. The Court may direct such additional publication of notice as it deems advisable. The forms of the notices by mail and by publication shall be approved by the Court.

(e) After the hearing on such petition the Court shall determine the stockholders who have complied with the provisions of this section and become entitled to the valuation of and payment for their shares, and shall appoint an appraiser to determine such value. Such appraiser may examine any of the books and records of the corporation or corporations the stock of which he is charged with the duty

of valuing, and he shall make a determination of the value of the shares upon such investigation as to him seems proper. The appraiser shall also afford a reasonable opportunity to the parties interested to submit to him pertinent evidence on the value of the shares. The appraiser, also, shall have such powers and authority as may be conferred upon masters by the rules of the Court of Chancery or by the order of his appointment.

(f) The appraiser shall determine the value of the stock of the stockholders adjudged by the Court of Chancery to be entitled to payment therefor and shall file his report respecting such value in the office of the Register in Chancery and notice of the filing of such report shall be given by the Register in Chancery to the parties in interest. Such report shall be subject to exceptions to be heard before the Court both upon the law and facts. The Court shall by its decree determine the value of the stock of the stockholders entitled to payment therefor and shall direct the payment of such value, together with interest, if any, as hereinafter provided, to the stockholders entitled thereto by the surviving or resulting corporation upon the transfer to it of the certificates representing such stock, which decree may be enforced as other decrees in the Court of Chancery may be enforced, whether such surviving or resulting corporation be a corporation of this State or of any other state.

(g) At the time of appointing the appraiser or at any time thereafter the Court may require the stockholders who demanded payment for their shares to submit their certificates of stock to the Register in Chancery for notation thereon of the pendency of the appraisal proceedings, and if any stockholder fails to comply with such direction the Court may dismiss the proceedings as to such stockholder.

(h) The cost of any such appraisal, including a reasonable fee to and the reasonable expenses of the appraiser, but exclusive of fees of counsel or of experts retained by

any party, may on application of any party in interest be determined by the Court and taxed upon the parties to such appraisal or any of them as appears to be equitable, except that the cost of giving the notice by publication and by registered mail hereinabove provided for shall be paid by the corporation. The Court may, on application of any party in interest, determine the amount of interest, if any, to be paid upon the value of the stock of the stockholders entitled thereto.

(i) Any stockholder who has demanded payment of his stock as herein provided shall not thereafter be entitled to vote such stock for any purpose or be entitled to the payment of dividends or other distribution on the stock (except dividends or other distributions payable to stockholders of record at a date which is prior to the effective date of the merger or consolidation) unless the appointment of an appraiser shall not be applied for within the time herein provided, or the proceeding be dismissed as to such stockholder, or unless such stockholder shall with the written approval of the corporation deliver to the corporation a written withdrawal of his objections to and an acceptance of the merger or consolidation, in any of which cases the right of such stockholder to payment for his stock shall cease.

(j) The shares of the surviving or resulting corporation into which the shares of such objecting stockholders would have been converted had they assented to the merger or consolidation shall have the status of authorized and unissued shares of the surviving or resulting corporation.

(k) This section shall not apply to the shares of any class or series of a class of stock, which, at the record date fixed to determine the stockholders entitled to receive notice of and to vote at the meeting of stockholders at which the agreement of merger or consolidation is to be acted on, were either (1) listed on a national securities exchange, or (2) held of record by more than 2,000 stockholders, unless

the certificate of incorporation of the corporation issuing such stock shall otherwise provide; nor shall this section apply to any of the shares of stock of the constituent corporation surviving a merger if the merger did not require for its approval the vote of the stockholders of the surviving corporation, as provided in subsection (f) of Section 251 of this title. This subsection shall not be applicable to shares of any class or series of a class of stock of a constituent corporation if under the terms of a merger or consolidation pursuant to Section 251 or Section 252 of this title the holders thereof are required to accept for such stock anything except (a) shares of stock or shares of stock and cash in lieu of fractional shares of the corporation surviving or resulting from such merger or consolidation; or (b) shares of stock or shares of stock and cash in lieu of fractional shares of any other corporation, which at the effective date of the merger or consolidation will be either (1) listed on a national securites exchange or (2) held of record by more than 2,000 stockholders; or (c) a combination of shares of stock or shares of stock and cash in lieu of fractional shares as set forth in (a) and (b) of this subsection.

(As amended by Ch. 186, Laws of 1967, Ch. 148, Laws of 1969 and Ch. 106, Laws of 1973.)